WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH, 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Brown
Milwaukee
Winnebago
Waukesha

WEDNESDAY, MARCH 13, 2013

9:45 a.m.	11AP1158	-	Showers Appraisals, LLC v. Musson Bros., Inc.
10:45 a.m.	11AP2888	-	Village of Elm Grove v. Richard K. Brefka

THURSDAY, MARCH 14, 2013

9:45 a.m.	11AP394-CR	-	State v. Demone Alexander
10:45 a.m.	{11AP1770-CR	-	State v. Brandon M. Melton
	{11AP1771-CR	-	State v. Brandon M. Melton
1:30 p.m. -	11AP1121	-	Paul Davis Restoration of S.E. Wisconsin, Inc. v. Paul Davis Restoration of Northeast Wisconsin

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 13, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Judge Barbara H. Key, presiding.

2011AP1158 Showers Appraisals v. Musson Brothers

This case involves a lawsuit over water damage that occurred to a privately owned building during a road construction project in Oshkosh in the summer of 2008. The Supreme Court examines whether a private governmental contractor is entitled to sovereign immunity under Estate of Lyons v. CNA Insurance Company, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996) for its efforts to maintain water drainage on the construction site so as to protect the adjacent private property from water damage.

Some background: The state hired Musson Brothers to reconstruct about a one-mile stretch of State Highway 44 (Ohio Street) in Oshkosh. The construction work was being done pursuant to an agreement between the city and the state Department of Transportation (DOT).

The agreement called for, among other things, the replacement of the sanitary and sewer mains in an area that included Mark W. Showers' business, Showers Appraisals, at the corner of 6th Street and Highway 144. The contract included DOT's Standard Specifications for Highway and Structure Construction, which stated, in part, that Musson was "solely responsible for the means, methods, techniques, sequences, and procedures of construction."

During the project, Musson removed most of the storm sewer system serving the worksite. The city contends this was contrary to a verbal agreement that Musson would remove the storm sewer piecemeal, block-by-block, so that the bulk of the storm sewer system would remain operational during the course of the construction work.

The area received historically heavy rains June 8 through June 12, 2008, including 4.36 inches of rain on June 12. The worksite flooded, and water eventually channeled its way under Showers' basement floor, which ruptured from the hydrostatic pressure. More than seven feet of water filled Shower's basement, resulting in approximately $140,000 in uninsured damages.

Showers sued Musson and the city, alleging that his property was damaged as a result of negligence. The city and Musson each filed cross-claims for indemnification, and they each filed motions for summary judgment against all of Showers' claims. The trial court granted summary judgment, reasoning that governmental immunity applied to both the City and Musson.

Showers claimed on appeal that Musson was not entitled to governmental immunity as an agent under Lyons because the contract did not contain "reasonably precise specifications." Showers claimed that Musson had too much discretion as to how to go about its work. Therefore, Showers claimed that Musson fell outside the Lyons criteria because it was too independent from the state to be classified as an "agent."

However, the Court of Appeals held that DOT's standard specifications, combined with DOT's regular oversight of Musson's work, curtailed Musson's discretion in such a way that Musson was subject to "reasonably precise specifications," as Lyons requires. The Court of Appeals found that Musson had immunity under Lyons.

A decision by the Supreme Court could clarify the limits of governmental immunity under the circumstances presented here.

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 13, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge Mark D. Gundrum, presiding.

2011AP2888 Village of Elm Grove v. Brefka

This case examines whether a municipal court or a circuit court has competence to extend the deadline for requesting a refusal hearing under Wis. Stat. § 343.305 if the defendant does not meet the pre-condition of requesting a hearing within 10 days.

Some background: Richard K. Brefka's vehicle was stopped by Village of Elm Grove police on Dec. 12, 2010. During the traffic stop Brefka apparently refused the police officer's request that he undergo a chemical blood alcohol test. Following Brefka's refusal, the police officer gave Brefka a "Notice of Intent to Revoke Operating Privilege" pursuant to Wis. Stat. § 343.305(9)(a). The notice was dated Dec. 12, 2010. Consistent with the statute, the notice advised Brefka that he had 10 days to request a refusal hearing and that his failure to request a refusal hearing would lead to the court revoking his operating privileges 30 days after the date of the notice.

Brefka's attorney requested a refusal hearing, but did not do so until Dec. 28, 2010, which was more than 10 days after the date on which Brefka received the notice. Brefka retained new counsel, who filed a motion with the municipal court on July 14, 2011 to extend the time limit for requesting a refusal hearing. The motion requested that the deadline for requesting a refusal hearing be extended due to the excusable neglect of both Brefka and his original attorney. The village of Elm Grove opposed Brefka's motion and moved to strike his untimely request for a refusal hearing.

After holding a hearing on the issue, the municipal court denied Brefka's motion and dismissed his request for a refusal hearing. It concluded that Brefka's failure to request the refusal hearing within the 10-day period deprived it of competence to proceed with Brefka's request. The circuit court agreed with the municipal court's decision and remanded the matter to the municipal court, presumably to proceed with the revocation of Brefka's driving privileges.

Brefka argued on appeal that the municipal court and the circuit court had competence to extend the deadline for requesting a refusal hearing under Wis. Stat. §§ 800.115(1) and 806.07. Section 800.115(1) allows a defendant in a municipal court case to move for relief from a judgment or order on the grounds of excusable neglect within six months of the municipal court ruling. Similarly, Wis. Stat. § 806.07(1)(a) grants a circuit court discretion to relieve a party from the effect of a judgment or order due to excusable neglect. Brefka contended that these provisions authorize discretion in the municipal and circuit courts because the Court of Appeals had ruled in State v. Schoepp, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996), that a refusal proceeding is a special proceeding to which the rules of civil procedure are applicable.

The Court of Appeals rejected Brefka's arguments and held that municipal and circuit courts lacked competence to consider Brefka's untimely request for a refusal hearing and his motion to extend the time within which to file such a request. Relying on the rule that statutes are to be construed by discerning the plain meaning of the words used by the legislature, the Court of Appeals pointed to the fact that Wis. Stat. § 343.305(9)(a)4. explicitly states that

revocation will begin on the 30th day if no request for a hearing is received with the 10-day period.

Brefka contends that Wis. Stat. § 343.305(9)(a) establishes the 10-day limit to request a refusal hearing. He asserts that the statute is silent as to whether courts can extend the time limit or allow a reopening of the refusal issue after a suspension has been imposed. Because the statute is silent on this point, Brefka contends that Schoepp requires the normal rules of civil procedure to come into play, which allow for judicial extensions of deadlines.

The village of Elm Grove contends that Brefka's assertion that refusal proceedings are routinely reopened is unsupported by facts of record. It seeks a decision affirming the Court of Appeals' interpretation of the relevant statutes.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 14, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Carl Ashley, presiding.

2011AP394-CR State v. Alexander

This case examines whether a criminal defendant has a constitutional right to be present when a trial court questions a sitting juror and dismisses that juror for cause, or whether that right may be waived by counsel without the trial court conducting a personal colloquy with the defendant.

Some background: Demone Alexander was convicted, following a jury trial, of the 2007 shooting death of Kelvin Griffin. Alexander contends that his constitutional right to be present during jury selection was violated when the trial court conducted in-chambers interviews with two jurors in his absence. It is undisputed the discussion happened in the presence of both counsel, and that Alexander's counsel waived his presence.

Near the end of the trial "Juror 10" told the bailiff that she might be acquainted with a woman (later identified as "Monique") in the gallery of the courtroom. The trial court explored the matter further in chambers with both counsel for Alexander and the state present, discussing the juror's relationship to a woman in the gallery who had been friends with the juror's sister.

The trial court withheld decision, and moved on to an issue involving a second juror, "Juror 33."

Again, in chambers, with all counsel present, though without Alexander, "Juror 33" told the trial court that he knew a witness who had just finished testifying for the defense, and that he recognized the witness as soon as he saw him as someone he knew for about three years.

The following day, the day for closing arguments and deliberations, a third juror issue surfaced, again involving "Juror 10". That morning, "Juror 10" called another juror to say she would not be in because her boyfriend was in a car accident. This information was given to the trial court.

The court, the state and the juror discussed the situation at length, and the court ultimately struck "Juror 10" and "Juror 33".

On appeal, the Court of Appeals concluded that Alexander's presence in the trial court's chambers during the interview of the two jurors during trial was properly waived by his trial counsel.

Alexander now asks whether a defendant has a personal, constitutional right to be present whenever any substantive step is taken in a case, including the right to be present at all proceedings when the jury is being selected. In support of this argument the petitioner cites Wis. Stat. § 971.04(1) (which provides in relevant part that a "defendant shall be present … [d]uring voir dire of the trial jury.").

The Court of Appeals disagreed with the broad definition of *voir dire* this argument requires, ruling that this constitutional and statutory mandate is applicable only to the initial selection of the jury, i.e., prior to the taking of testimony. The Court of Appeals stated: "Once the jury has been selected and sworn and the trial has begun, a defendant may voluntarily absent himself from various trial proceedings."

Alexander asserts that prior appellate decisions have held that "[a] trial runs from the commencement of jury selection through the final discharge of the jury and at any time an action is taken affecting the accused." Williams v. State, 40 Wis. 2d 154, 160, 161 N.W.2d 218 (1968).

WISCONSIN SUPREME COURT
THURSDAY, MARCH 14, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judges Robert G. Mawdsley and Mark D. Gundrum, presiding.

2011AP1770-71-CR State v. Melton

This case examines whether a circuit court has "inherent authority" to order the destruction of a presentence investigation (PSI) report after entry of judgment not related to charges in the original sentencing proceeding.

Some background: Brandon Melton pled guilty to second-degree sexual assault of a child under 16 years of age and to theft of movable property. Additional charges for battery, felony bail jumping, and second-degree sexual assault of a child were dismissed but read in for sentencing purposes. The circuit court ordered the Department of Corrections (DOC) to prepare a PSI report.

After receiving the Nov. 19, 2009 PSI report, Melton moved to strike portions of it that discussed certain uncharged offenses under a section entitled "Description of Offenses." At a hearing on the motion held before sentencing, he argued that the inclusion of the uncharged offenses was prejudicial and violated DOC rules.

The circuit court concluded the information about the uncharged offenses would be of little use to the court at sentencing and would be prejudicial to the defendant after sentencing. The circuit court, citing its inherent authority, issued a written order on March 31, 2010, directing the DOC to prepare a second PSI report omitting the objectionable information. The order also directed that the first PSI report "shall be sealed and destroyed following the expiration of any appellate time limits." Neither party objected to this order.

At the start of the sentencing proceeding (which was held before a different judge), defense counsel advised the sentencing court that a new PSI report had been prepared and was to be used for sentencing purposes. The defendant was sentenced to four years of initial confinement and eight years of extended supervision.

Following sentencing and entry of the judgments, the successor circuit court (a third judge), on its own motion, scheduled a review hearing after discovering the order that the first PSI report was to be destroyed after the expiration of the appellate time limits. The court advised the parties it had set the matter for a hearing because it did not believe it had the authority to destroy a PSI report. Defense counsel advised that the defendant was pursuing an appeal so the matter of destroying the PSI report might be premature.

The circuit court found that since it was ordering the PSI report not be destroyed, the pendency of the appeal was irrelevant. The circuit court modified the prior order, mandating that the first PSI report be sealed rather than destroyed. The defendant appealed, and the Court of Appeals reversed.

The Court of Appeals held the circuit court has the authority to destroy the first PSI report to prevent confusion as to which PSI report in the file should be used for sentencing. It pointed to this court's decision in State v. Henley, 328 Wis. 2d 544, ¶73, which said that courts exercise inherent authority "to ensure the efficient and effective functioning of the court, and to

fairly administer justice." The Court of Appeals said the defendant's appeal was still pending and the potential existed for resentencing.

The state says the Court of Appeals' decision is not supported by prior "inherent authority" cases, and that placing a PSI report under seal achieves the same end as destruction because it prevents public disclosure of the contents of the report.

The state also argues destruction of the PSI report is contrary to SCR 72.01, which mandates the retention of all records in felony cases for 50 years after entry of judgment, and that there is a real risk that courts will use the Court of Appeals' decision in this case to justify destroying other court records in other circumstances.

Melton argues having two PSI reports in a file presents an opportunity for confusion and injustice and that the state never addresses what purpose would be served by keeping the "wrong" PSI report in the court file when a valid PSI report remains intact.

WISCONSIN SUPREME COURT
THURSDAY, MARCH 14, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Brown County Circuit Court decision, Judge Donald R. Zuidmulder, presiding.

2011AP1121
Paul Davis Restoration of S.E. Wisconsin, Inc. v. Paul Davis Restoration of Northeast Wisconsin

This case arises from a dispute over business territory between two Paul Davis Restoration franchises. The Supreme Court examines issues related to whether a judgment entered against only an entity's trade name is enforceable against the trade name and the underlying entity.

Some background: Paul Davis Restoration of S.E. Wisconsin (Paul Davis S.E.) filed a statement of claim against Paul Davis Restoration of Northeast Wisconsin (Paul Davis N.E.), alleging that Paul Davis N.E. violated a franchise agreement by performing work in Paul Davis S.E.'s territory without providing proper notification or compensation.

The parties proceeded to binding arbitration and Paul Davis S.E. was awarded $101,693. Paul Davis S.E. moved the circuit court to confirm the award and named "Paul Davis Restoration of Northeast Wisconsin / Matthew Everett" as defendants. Because Everett was never made a party to the arbitration action, he objected to being named as a defendant in the motion to confirm the arbitration award.

Paul Davis S.E. subsequently moved the Milwaukee County Circuit Court to enter judgment against not only Everett personally, but also EA Green Bay LLC, which operated the subject franchise business under the Paul Davis Restoration trade name. The circuit court did not enter judgment against either Everett or EA Green Bay LLC but, rather, against the d/b/a designee—"Paul Davis Restoration of Northeast Wisconsin." Paul Davis S.E. did not appeal the name in the judgment entry.

Paul Davis S.E. then filed a garnishment action in Brown County seeking to enforce the judgment. The garnishee bank account was held by Denmark State Bank under the name "EA Green Bay LLC d/b/a Paul Davis Restoration & Remodeling of NE WI d/b/a Building Werks." Paul Davis N.E. moved to dismiss the action, claiming the underlying judgment against it was unenforceable and could not form the basis for the garnishment action.

The circuit court said the evidence made clear that EA Green Bay LLC and Paul Davis N.E. were the same entity. Thus, the court ordered the bank to release account funds to satisfy Paul Davis S.E.'s judgment. Paul Davis N.E. appealed. The Court of Appeals reversed.

On appeal, Paul Davis N.E. continued to argue that the underlying judgment against it was void as unenforceable because a d/b/a designee is not a legal entity. The Court of Appeals agreed.

The Court of Appeals said if judgment had been entered against EA Green Bay LLC, any assets held under its d/b/a designation could have been garnished to satisfy the judgment, but it said the converse is not true. It said since the judgment confirming the arbitration award was entered only against the d/b/a designee, a legal non-entity, it is unenforceable and the circuit court erred when it denied Paul Davis N.E.'s motion to dismiss the garnishment action.

Paul Davis S.E. argues that a decision by the Supreme Court would help to establish a policy to discourage entities from hiding assets under various trade names. Paul Davis S.E. reasons that because the money judgment was entered against Paul Davis N.E. and Paul Davis N.E. is simply another way to refer to EA Green Bay LLC, the judgment against Paul Davis N.E. is equivalent to a judgment against EA Green Bay LLC, which means the garnishment action can proceed against the bank account which bears EA Green Bay LLC's name.

Paul Davis N.E. says that Paul Davis S.E. never requested leave of the court to add EA Green Bay LLC as a defendant, nor did Paul Davis S.E. ever try to specifically include EA Green Bay LLC as a party to the arbitration proceedings. Paul Davis N.E. says that Paul Davis S.E.'s attempt to enforce its judgment against EA Green Bay LLC violates sound public policy that requires parties be named properly in pleadings to any lawsuit.